TESTIMONY

of the

AMERICAN JEWISH CONGRESS

before the

SUBCOMMITTEE ON THE CONSTITUTION

of the

HOUSE COMMITTEE ON THE JUDICIARY

concerning

H.R. 2679

THE PUBLIC EXPRESSION OF RELIGION ACT OF 2005

June 22, 2006

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On behalf of the American Jewish Congress, I want to thank you for providing it with an opportunity to submit its views on H.R. 2679, *The Public Expression of Religion Act of 2005*. We believe this bill to be exceedingly bad public policy. It is arguably unconstitutional as well, but this Committee need not reach that issue to determine that this bill should not pass. We urge you to give this bill the decent burial it deserves.

The bill has two sub-sections. The first bans all but injunctive relief in cases arising under the Establishment Clause of the First Amendment. The second carves out an exception from the general rule of 42 U.S.C. § 1988 providing for an award of attorney's fees in cases in which plaintiffs bring successful actions to vindicate constitutional rights under, *inter alia*, 42 U.S.C. § 1983.

I. The Limits On Relief

Remedies

H.R. 2679 casts a broad net. It simply bans any but injunctive relief in cases brought under the Establishment Clause. Thus, even if a state or locality were to formally establish a state church, prefer one religion over another, *Larson v. Valente*, 456 U.S. 1 (1982), or coerce participation in religious exercises—all of which are core violations of the Establishment Clause—a plaintiff would be entitled to nothing but injunctive relief, not nominal damages, not punitive damages and, most peculiarly, not even a declaratory judgment.

When the *Prison Litigation Reform Act*, 42 U.S.C. § 1997 (PLRA), was enacted, there was a substantial debate whether Congress has the power to limit the remedies available to the federal courts to cure constitutional violations. We need not enter the thicket. For present purposes, we acknowledge that Congress has substantial but not unlimited authority over remedies. Nevertheless, H.R. 2689 is indefensible both as policy and constitutional law.

Moreover, because H.R. 2679 does not address the universe of constitutional claims against local governments, it cannot be claimed that the bill addresses a generally applicable problem with regard to remedies available in § 1983 claims or with the award of attorney's fees in such cases. If H.R. 2679 is to be sustained, it must be because something unique to Establishment Clause claims justifies treating such claims less well than all other § 1983 claims.

Just how draconian these restrictions are may be judged by comparing the proposed *Public Expression of Religion Act* with the *Prison Litigation Reform Act*, 42 U.S.C. § 1997e(e), which denies damages to inmates in any civil action in which they allege a violation of rights, unless there is physical injury. On its face, this would seem to deny the possibility of relief in any prisoner case seeking to vindicate rights under either the Free Exercise or Establishment Clauses.

The courts have generally read this ban not to deny courts the power to issue declaratory judgments. See, *e.g*., *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002). *Cf. Boxer v. Harris*, 437 F.3d 1107, 1111 (11th cir. 2006) (collecting cases; noting issue is open in the 11th Circuit). About half the circuits that have spoken on the subject award actual and punitive damages for violations of First Amendment rights, refusing to allow these fundamental constitutional rights to be rendered nugatory by PLRA, *Allah v al-Hafeez*, 226 F.3d 247 (3rd Cir. 2000); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998); *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2005). *Contra Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001). The Second and Eighth Circuits allow for nominal and punitive damages as well as declaratory relief, but not compensatory damages, for First Amendment violations. *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002); *Royal v. Kavtzky*, 375 F.3d 720 (8th Cir. 2004)We are unable to conceive of any rationale, other than naked hostility toward

the Establishment Clause as interpreted by the federal courts, that would justify denying to law-abiding citizens at least the same access to the broad panoply of judicial relief afforded convicted felons in First Amendment cases.[1]

We note, too that the *Public Expression of Religion Act*'s preference for injunctive relief over declaratory relief inverts the ordinary preference for declaratory relief over injunctive relief. The cases are legion in which courts have refused to enjoin public officials after declaring that their actions violated the Federal Constitution because the very fact of a declaration of the obligation of public officials was thought sufficient to bring about compliance without the necessity for intrusive and demeaning injunctions. Courts properly assume that public officials will abide by declared constitutional rights and often presume future compliance.

Under H.R. 2679, in order to afford plaintiffs any relief, courts face a Hobson's choice. They may enjoin officials they would otherwise not subject to the indignity of an injunction under the equitable rules governing injunctions or they may leave a plaintiff who has proven an actual violation of the Constitution wholly without any remedy. The latter possibility is nothing less than an open

[1] Although the bill's title suggests a preoccupation with a subset of Establishment Clause claims—those involving "public religious expression"—the actual text of the bill is not so limited, but applies to all Establishment Clause claims. We proceed on the assumption that the text, not the title, is controlling.

invitation for local officials to ignore existing constitutional law on the chance that nothing will happen.

Consider what this would mean in the real world. A student is compelled by a teacher to participate in prayer. This is a one-time event. The teacher acts on her own. No school policy authorizes such action. Suit is brought by the student against the teacher. Without question, that action violates the Constitution as it is currently understood by the courts and as it would be understood on almost any view of the Clause.

By the time a court case is brought and is resolved, the school year will have ended. The student will no longer have the offending teacher. The likelihood of a further violation by this teacher directed at this student is so slight that it is doubtful that the student even has standing to seek an injunction against further violations. *Cf. Los Angeles v. Lyons*, 461 U.S. 95 (1983); see *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005). Even if there were standing, as matter of discretion it is doubtful that most judges would issue an injunction. This is a case where the only practical remedy is damages. Yet by its terms, H.R. 2679 denies the courts the right to give the student any damage remedy, even nominal damages. By its terms, it denies the courts authority to issue declaratory relief, and provide even the psychic satisfaction of official vindication. (Of course,

by denying attorney's fees, the Act makes it likely that few suits would be brought even in cases where an injunction would be appropriate.)

A declaratory judgment offers more than just psychic satisfaction, Should officials repeat their violation of declared rights, a plaintiff could seek supplemental relief, 28 U.S.C. § 2202, including an injunction. And if that were violated, plaintiff could seek to hold the offending officials in contempt, with all the remedies that flow from such a finding. But if courts are stripped of the power to issue declaratory judgments, and perhaps supplemental relief, this path to the contempt power would also evaporate. We assume, but unfortunately cannot be certain, that the legislation is not designed to strip the courts of the power to remedy contempts of court with monetary damages. It can be read to do so.

And what possible justification can there be for denying damages in cases such as the one I posit? It is not to protect public officials in doubtful cases, because the law is clear that public officials are immune from damages except where the law was clearly settled at the time they violated it. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). So the repeal of damages in this bill is only about violations of clearly settled law. For example, the law is pellucidly clear that officially coerced prayers are unconstitutional. *Lee v. Weisman*, 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting). Violations of clearly settled constitutional rights generate a

presumptive right to at least nominal damages, *Carey v. Piphus*, 435 U.S. 247 (1978).

Moreover, coerced prayer cases do not exhaust the possibilities for damages in Establishment Clause cases. In *Larson*, *supra*, officially disfavored churches were subjected to onerous regulatory requirements with attendant expenses, while more favored churches were exempted. H.R. 2679 would bar recovery for the added, but illegally imposed, costs.

Again, other than raw hostility to the non-establishment of religion as mandated by the Constitution, we can conceive of no justification for the wholesale denial of monetary damages or declaratory relief. It is simply not true, as is the case with regard to prison inmate litigation addressed by the *Prison Litigation Reform Act*, that in Establishment Clause cases public officials operate under especially difficult circumstances that prison officials do day-by-day.

Damages are in any event not readily recovered in § 1983 claims. Where the law is not clearly established, the qualified immunity doctrine is a barrier to recovery. *Brosseau v. Haugen*, 543 U.S. 194 (2004). Municipal bodies, including school boards, are only liable in damages for the acts of their line employees when they act pursuant to an official policy set by high ranking public officials, again a

high hurdle. *Jett v. Dallas I.S.D.*, 491 U.S. 701 (1989). And, of course, actual damages must be shown and not presumed, *Carey v. Piphus*, *supra*.

In almost 30 years of practice in the field, I can recall no more than half-a-dozen Establishment Clause cases in which actual damages have been awarded—but these were all horrific cases, involving flagrant violations of the Clause. In at least two of those cases, the reaction to plaintiffs' having objected to traditional religious practices was so severe they had to leave the community. But where actual damages are shown, H.R. 2679 treats citizens worse than prison inmates. What possible justification can there be for that other than hostility to the law as declared by the courts?

That the interest advanced by the bill is hostility to existing Establishment Clause jurisprudence, not the preservation of the public fisc, is indicated by a comparison of two sets of cases, each presenting the same legal issues for consideration by the courts. In one, the full panoply of judicial remedies is available, as are attorney fees. In the other, only injunctive relief is possible.

Example 1. A private party seeks to erect a Latin cross on public property, invoking his free speech rights. The city responds that it is barred from granting the request by the Establishment Clause. The private party sues.

Example 2. A private party seeks to erect a Latin cross on public property on Good Friday, and the town acquiesces, believing it is obligated to do so by the Free Speech Clause. The town, in turn, is sued by other citizens claiming that the display violates their rights under the Establishment Clause.

Example 3. A teacher, invoking academic freedom, prays with her class. She is disciplined by the school district, on the ground that the teacher's actions violated the Establishment Clause. The teacher sues her employer, alleging the discipline violated her Free Speech and Free Exercise rights.

Example 4. A student sues a teacher because the teacher led a class in prayer and refused to excuse students unwilling to participate. The defendant teacher invokes the Free Speech Clause in his own defense.

Leaving aside the merits of these cases for the moment, it is apparent that the plaintiffs in cases 1 and 3 have available to them a full range of judicial remedies, and are eligible for an award of attorney fees. By contrast, plaintiffs in cases 2 and 4 are entitled only to injunctive relief, if they can meet the stringent requirements for an injunction. Each of these cases is of a type now routine. Each presents exactly the same legal issues, albeit only sometimes is the Establishment Clause injected into the case at the behest of the plaintiffs. Each of these litigations makes the same demands on the government, the courts and the public fisc. Each raises

exactly the same Establishment Clause issues. But only in some does H.R. 2679 have any effect

Plaintiffs in cases 2 and 4 have no greater incentive than plaintiffs in cases 1 and 3 to bring legally frivolous or marginal claims.

In upholding the restriction on recovery (and attorney's fees) in the *Prison Litigation Reform Act* ("PLRA"), the courts have insisted that there must exist a rational basis for distinguishing between prison claims and all other constitutional claims bought under Section 1983. See, *e.g.*, *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (*en banc*); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997).

In the PRLA context, the courts have found that prisoners had a unique set of incentives to engage in frivolous litigation and harass their keepers since they were largely immune from any penalties and costs imposed on other litigants, and that hence, such litigation posed a special risk to the public fisc and prison governance. *Zehner*, *supra*. As a result, Congress had a solid basis to create countervailing disincentives to discourage litigation of marginal value. As noted, that is not the case with the Establishment Clause. Whatever disputes there may be at the margins of that Clause, no one can doubt the importance of the principle embodied in that claim for the religious peace Americans have enjoyed, nor that the overwhelming majority of cases present issues of profound importance. Such

cases are not brought, in my experience, promiscuously or lightly. That is as true of cases such as 2 and 4 as it is of cases 1 and 3.

None of the factors involved in inmate litigation—or any other ones we can conceive—justify the exception created by H.R. 2679. No one has an incentive to engage in frivolous Establishment Clause litigation, especially given the notoriety attaching to such plaintiffs. See *Santa Fe I.S.D. v. Doe*, 530 U.S. 290 (2000) (noting efforts by school officials to expose and harass Establishment Clause plaintiffs). I am unaware of any Establishment Clause challenge, let alone one brought by the "separationist" groups which bring a majority of these cases (ACLU, AJCongress, Americans United, Freedom from Religion Foundation), ever having incurred Federal Rule 11 sanctions for bringing a frivolous action.[2]

Establishment Clause litigants are not inmates with unlimited time on their hands for whom litigation is a form of recreation, not hard work. They have no incentive to lie or retaliate, *Johnson v. Perry, supra*. They, or the organizations representing them, typically have to initially bear by themselves the not inconsiderable costs of litigation. The number of Establishment Clause cases (that is, for purposes of H.R. 2679, cases in which plaintiffs invoke the Establishment Clause), brought in the federal courts is a miniscule portion of the docket, unlike

[2] But see *Peloza v. Capistrano U.S.D.*, 37 F.3d 517 (9th Cir. 1994) (Establishment Clause challenges to ban on teaching evolution; parts of claim frivolous; no Rule 11 fees).

prisoner civil rights cases. The proposed statute cannot possibly be defended as necessary to spare the federal courts from a deluge of lawsuits.

It is true that some have contended that the Establishment Clause creates no individual rights, but is merely a federalism provision. *Elk Grove I.S.D. v. Newdow*, 547 U.S. 1, 49-50 (2004) (Thomas, J., dissenting). That is not, however, the law, because it is an argument that has failed to persuade anyone but Justice Thomas. Congress may not make it law for the Supreme Court by majority vote.

We know authoritatively that Congress may not invoke powers it undoubtedly possesses, such as the power to regulate remedies, to enlarge or contract the interpretation of the Constitution. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating *Religious Freedom Restoration Act* because it expands meaning of Constitution as interpreted by the Court).

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, … alterable when the legislature shall please to alter it. *Marbury v. Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. … Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

521 U.S. at 529 (some citations omitted).

If this is true of congressional efforts to expand constitutional rights, it is *a fortiori* true of congressional efforts to contract them.

In many places in this country, public officials routinely ignore Establishment Clause decisions of the Supreme Court and other federal courts. The political dynamic is simple enough. Popular politics or tradition supports some evident and blatant violations of the Establishment Clause, say school prayer or permanent religious displays. Public officials make a deliberate decision to ignore the law, and to appease public opinion, betting (often correctly) that dissenters would not risk community displeasure to file a court challenge. Often, like George Wallace in the schoolhouse door, their own popularity is enhanced by their defiance.

In the fall of 1989, I represented a Jewish high school football player who objected to school-sponsored prayers at every football game. We sought interim injunctive relief for my client to remedy that blatant Establishment Clause violation. It was denied. (The school board contended, *inter alia*, that if the court granted the injunction there would be disorder at the next game.)

We had made one important tactical error. We filed the lawsuit (*Berlin v. Okaloosa County*) while the school superintendent was running for reelection. He promptly drew a line in the sand, announcing that a vote for him was a vote to

resist to the end all efforts to ban prayer at football games. The end to the litigation came only after he was safely reelected and the local newspapers began to speculate on what the attorney's fees would be if the lawsuit was successful.

Here, the available of attorney's fees put an end to a calculated defiance of the Constitution for cheap political advantage. It is a good thing that the fee statute exists for it serves to provide a tangible disincentive for the manipulation of the Constitution for the short-term advantage of unprincipled public officials. Eliminate that disincentive—as H.R. 2679 would do—and the inevitable, perhaps the desired result, will be more open defiance of well-settled constitutional principle.

To repeat, the only justification for the line drawn by H.R. 2679 is unvarnished hostility toward one set of constitutional claims,[3] and a desire of its sponsors to encourage local government to defy existing restraints on endorsing and encouraging religion, particularly in ways not readily subject to injunctive relief such as one-time ceremonies or other temporary events. That is not a legitimate purpose; it may indeed be an impermissible sectarian purpose. See, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987). Congress should not be in the business of encouraging violations of the Nation's fundamental charter.

[3] This is not a case involving enhanced protection for only some claims, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), but reduced protection for a disfavored class of claims.

II. The Attorney Fee Section Is Likewise Unacceptable

H.R. 2679 excludes citizens whose rights under the Establishment Clause, including the rights not to be coerced to participate in religious practice and to be free of religiously discriminatory rules have been violated from an award of attorney's fees, generally available to § 1983 plaintiffs. Again, H.R. 2679 treats citizens' Establishment Clause claims less advantageously than it treats the constitutional claims of inmates.

The bill treats citizens vindicating core and often undisputed aspects of the Establishment Clause less well than it treats inmates suing their custodians. A successful inmate litigant is entitled to attorney's fees, like all other successful litigants under § 1983, except that fees for prisoners are capped by reference to the *Criminal Justice Act*, 18 U.S.C. § 3006A. (Presumably, if H.R. 2679 passes, inmates raising Establishment Clause claims will also be denied attorney's fees, unlike all other inmate litigants.) In upholding the constitutionality of the fee cap against claims that the cap interferes with access to courts, courts have emphasized that the statute does not deny all fees, *Johnson*, *supra*. H.R. 2679 does not even make a capped fee available to Establishment Clause litigants.

What possible reason could there be for treating citizen litigants substantially less well than prison litigants? Again, it must be nothing less than

naked hostility toward Establishment Clause claims itself. No rational reason justifies the crude line the bill draws. It therefore is doubtful that H.R. 2679 would withstand a constitutional challenge such as those brought unsuccessfully to challenge PLRA.

We recognize, of course, that the Constitution does not of its own force compel an award of attorney's fees. Congress could, if it thought it wise, repeal the attorney's fees statute, 42 U.S.C. § 1988, in its entirety and revert to the usual American rule on attorney's fees. What it may not, however, is pick and choose among favored constitutional rights without any acceptable rational basis for drawing a distinction.

It is true that on occasion, local government does not defend a practice because it fears incurring attorney's fees should it lose a legal challenge. But this too is a risk that cuts both ways. It is equally true that local government bodies have foregone litigating Establishment Clause defenses against claims of free exercise or religious free speech because of concern about attorney's fees. I have myself been involved in cases where substantial Establishment Clause defenses were not pursued because of a fear of paying attorney's fees to plaintiffs invoking the Free Speech Clause *See* D. Golden, *Saving Souls at School: Thanks To Court*

Rulings Some Teachers Are Leading Bible Clubs In Their Own Classrooms After the Bell, Wall Street Journal (May 20, 2006).

In passing the *Attorney Fees Act*, Congress recognized the importance of private litigation to enforce constitutional rights. In the ensuing decades attorney's fees have become an integral part of the mechanism for making real the rights guaranteed citizens by the Constitution. Our political institutions have adapted to that mechanism, both by considering it in setting their budgets, and more importantly, in taking constitutional law more seriously. Local government now treats constitutional law as relevant to local governments and the way they do business, and not just something, as a Montana state judge once memorably told a lawyer, only for the Supreme Court, *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979) ("you can give those [citations] to the Supreme Court"). The judge's reaction is, unfortunately, still common, although not nearly as common as it was before fees were mandated.

The attorney's fees statute embodies the view that the public weal is best served by ensuring official compliance with the Constitution. Given the imbalance of power and resources between the government and the citizen, and the costs of contemporary litigation, the *Attorney Fees Act* represents an important effort to recalibrate that balance. Its selective gutting would be a mistake of the first order.

If Congress is to begin to deny attorney's fees to unpopular cases, there will be no end to the loopholes it will be pressed to create. The attorney fee statute will soon be pock-marked with carve outs for controversial cases.

One does not need a particularly long memory to recall that desegregating the nation's schools was once a controversial subject. Indeed, as the Supreme Court's recent decision to review two school desegregation cases reveals, it remains a controversial subject. There were repeated efforts in the 1970's to restrict the remedial powers of the courts with respect to integration. An entire presidential campaign turned on that issue.

Any number of other civil liberties issues remain contentious: should Congress deny attorney's fees to those seeking to integrate schools; challenge reverse discrimination; ensure equal access to the ballot; invalidate English-only rules; exclude illegal aliens from government benefits; rectify abuse of the power of eminent domain; protect free speech for violent extremist groups; advance gay rights claims; resist ordinances protecting rights of gays and lesbians in cases affecting religious institutions?

Depending on the political winds of the moment, one or the other of these classes of claims will be politically controversial. To take but one set of current controversies: At some times and for some people, decisions expanding the rights

of gay and lesbian Americans, such as *Lawrence v. Texas*, 539 U.S. 558 (2003), will be controversial. At other times, and in other places in this country, decisions denying religious institutions the right to be excused from compliance with anti-discrimination laws will be controversial. See M. Stern, *Two-Way Street*, New York Sun (June 14, 2006). The only practical way to make sure that all these claims can be heard is to ensure that access to the courts is on an equal footing.

Conservatives may think that they do their causes no harm by restricting the access to the courts of "liberal" claims. Separating church and state, a cause dear to the Founders, is not a liberal preserve. But the major premise is mistaken. Once this Committee establishes exceptions to the *Attorney Fees Act* and the remedial powers of the federal courts in pursuit of one vision of church-state relations, it will set a precedent that will be invoked by others with very different visions, and no less convinced of the righteousness of their cause. They will point to H.R. 2679 as a controlling precedent.

H.R. 2679 represents a potentially catastrophic retreat from that view that we ought to encourage compliance with the Constitution, even where compliance is unpopular. It classifies some rights as preferred; others as discouraged or disfavored. There will be no end to the exceptions, with majorities using their political power to thwart enforcement of unpopular constitutional provisions—

provisions intended precisely to protect important principles against being swept away by the majority's passion of the moment.

* * *

I recognize that as we testify, political power temporarily rests with those who reject a sharp line dividing church and state. That dominance will not last forever. And when advocates of a sharp division between the two are politically ascendant, supporters of H.R. 2679 will be fighting to defeat exceptions of the sort they created but favoring their opponents' causes.

The bill you are considering today is a reflection of the mistaken view that Establishment Clause litigation is brought only by those who detest religion, and who seek a naked public square. That is a gross over-simplification, and in some cases, a lie.

Cases casting doubt on traditional civic religious practices are deeply unpopular among many Americans. Those decisions have been exploited by demagogues of all stripes to support their claim that there is a judicial declaration of war against religion and Christianity. If the subject today were the value of the separation of church and state as such, I would be pleased to defend most of those decisions. There certainly is no war on religion and Christianity. But I need not enter those lists today.

In recent years, conservatives have also successfully invoked the Establishment Clause to stop efforts to grant preferred status to "progressive" religious views on sexuality in the public schools. *Citizens for a Responsible Curriculum v. Montgomery County*, ___ F.Supp.2d ___ (D. Md. 2005); *Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d, 7780, 804-05 (E.D. Mich. 2003) Those were solid and welcome decisions, decision which should be hailed—and were hailed—by all who view the neutral and even-handed enforcement of the Establishment Clause as a guarantor of religious liberty, and not as a means of suppressing faiths with which one disagrees.

If H.R. 2679 were law, neither set of plaintiffs would have been entitled to attorney's fees, a real disincentive to litigation. The Michigan lawsuit involved a one-time event, long since complete by the time that case was adjudicated. Claims for injunctive relief were moot. H.R. 2679 would have denied all of us, including public school officials across the Nation, the sound guidance those decisions provide.

No one should think that the current balance of forces in religion and politics will prevail forever. One need not be much of a prophet to predict that in the coming years there will be a resurgence of political power to those holding "liberal" religious views, to say nothing of those hostile to public faith claims

altogether. Some of those persons are likely to attempt to use governmental authority to lord over their religious opponents. It is a sad fact of human nature that some of those who today protest official efforts to impose religion will, when they hold the reins of power, not hesitate to impose their secular views on others. When that happens, as it inevitably will, the sponsors of H.R. 2679 will rue the day that they supported this legislation.

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